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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1673

RALPH OLIVER DENNY

Petitioner

versus

STATE OF ALABAMA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. BAXLEY
Attorney General of Alabama

WALTER S. TURNER
Chief Assistant Attorney General
of Alabama

GEORGE W. ROYER, JR.
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

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STATE OF ALABAMA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The petitioner has applied to this Honorable Court for a Writ of Certiorari to review the judgment of the Court of Criminal Appeals of Alabama rendered on December 12, 1972. A petition to the Supreme Court for the Writ of Certiorari was denied on March 15, 1973.

Petitioner applied for this Writ of Certiorari under the provisions of Title 28, Section 1257(3), United States Code.

QUESTIONS PRESENTED

I

Whether petitioner may assert for the first time in the United States Supreme Court that issues which he had raised previously in state court only as principles of general state criminal law and procedure now present substantial Federal questions?

II

In a prosecution under the Alabama statute concerning indecent molestation of a child under the age of sixteen years, can a thirteen year old victim be an accomplice whose testimony must be corroborated?

III

Where no objection or no exception is taken to the oral charge of the trial court, may a portion of such charge be later asserted as error?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are adequately set forth in the petition.

STATEMENT OF THE CASE

On June 15, 1971, Ralph Oliver Denny was convicted of indecent molestation of a child under the age of sixteen years and sentenced to five years in the state penitentiary. On

appeal the Alabama Court of Criminal Appeals affirmed the judgment of the trial court in an opinion which appears in the Appendix of Denny's Petition For Certiorari to this Court. The Alabama Supreme Court denied the petition for certiorari and Denny filed the instant petition.

ARGUMENT

I

BECAUSE THE ISSUES NOW ASSERTED IN THIS COURT BY PETITIONER WERE ASSERTED BELOW AS CONSTITUTING PRINCIPLES OF GENERAL STATE CRIMINAL LAW AND PROCEDURE ONLY, HE MAY NOT NOW ASSERT THESE ISSUES AS CONSTITUTING SUBSTANTIAL FEDERAL QUESTIONS AND THEREBY OBTAIN REVIEW IN THIS COURT BY CERTIORARI.

It is essential to the jurisdiction of the United States Supreme Court under 28 U.S.C. 1257 that a substantial Federal question has been properly raised in the State court below. It is too late to raise the Federal question for the first time in the petition for certiorari filed with the Supreme Court, *Cardinale v. Louisiana*, 394 U.S. 437, 89 Sup. Ct. 1162, 22 L. Ed. 2d 398; *Hill v. California*, 401 U. S. 797, 91, Sup. Ct. 1106, 28 L. Ed. 2d 484. In the case at bar, petitioner has made no attempt at all to raise or pose any Federal question in the Alabama courts (see e.g., petitioner's brief to the Alabama Court of Criminal Appeals, Appendix p.; petitioner's brief in support of his application for rehearing to the Alabama Court of Criminal Appeals, Appendix p. ; and petitioner's petition for certiorari to the Alabama Supreme Court, Appendix p.); and no federal question was

considered or ruled on by the Alabama Court of Criminal Appeals in its opinion, (see *Denny v. State*, ____ Ala. App. ____, 274 So.2d 650 set out in the Appendix to the Petition, p. A-3) or by the Alabama Supreme Court in its denial of certiorari, (see *Ex Parte Denny*, ____ Ala. ____, 274 So.2d 651).

What petitioner is attempting to do instead in this case is to argue in this Honorable Court, for the first time, that the issues which he had raised previously in state court below only as issues involving principles of general state criminal law and procedure present substantial Federal questions. He asserts for the first time that his 6th Amendment right to trial by an impartial jury was violated by the trial court's giving and refusing to give certain charges and that his right to equal protection of law under the 14th Amendment was violated by the trial court's allowing the prosecution's case to go to the jury on what the petitioner contends is the uncorroborated testimony of accomplices. Such a practice of attempting to color for the first time in this Court as presenting constitutional claims, issues previously raised in state court as only principles of general state law has been long rejected by this Court, see *Re Robertson*, 156 U.S. 183, 15 Sup. Ct. 324, 39 L.Ed. 389; *Marrow v. Brinkley*, 129 U.S. 178, 9 Sup. Ct. 267, 32 L.Ed. 654. As the Court in *Robertson* stated:

> [J]urisdiction [cannot] be retained upon the suggestion made for the first time in this court, that if the court of appeals, proceeding upon the principles of general law only, were found to have erred in the rendition of its decree, the State of Virginia had thereby deprived the plaintiffs in error of their property without due process. 156 U. S. at 183, 15 S. Ct. at 325, 39 L.Ed. at 655.

Respondent respectfully submits that such is applicable

here and that petitioner is now unable to assert these issues in this Court. His complete failure to present the issues he now urges at any level of state court precludes this Honorable Court from considering them now.

II

UNDER ALABAMA LAW IN A PROSECUTION FOR INDECENT MOLESTATION OF A CHILD UNDER THE AGE OF SIXTEEN YEARS THE FACT THAT THE PROSECUTING WITNESS IS UNDER THE AGE OF THIRTEEN YEARS MAKES IRRELEVANT ANY DISCUSSION OF WHETHER SUCH WITNESS IS AN ACCOMPLICE WHOSE TESTIMONY MUST BE CORROBORATED.

Petitioner alleges that in this case, the Alabama State Courts have unequally applied the provisions of Title 15, Section 307, *Code of Alabama*, 1940 as amended, which requires that the testimony of an accomplice in a criminal prosecution be corroborated before a conviction can be had. In his argument of this ground for granting the petition for writ of certiorari, petitioner states:

> "In the case at hand, the evidence is uncontroverted that both juvenile participants were fourteen years of age or older at the time of the alleged incident." (Petitioner's brief at p. 9).

An examination of the record, however, shows this statement not to be true. The uncontroverted evidence rather was to the effect that witness White, the victim of the molestation in this case, was only thirteen years of age at the time of the incident. On direct examination the State developed the following testimony:

EVIDENCE ON BEHALF OF THIS (sic) STATE

DAYTON THOMAS WHITE, called as a witness, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (BY MR. BATCHELER) State your name for us, please?

A. Dayton Thomas White.

Q. Is your first name Dayton, D-a-y-t-o-n? (Spelling)

A. Yes, sir.

Q. And Thomas White?

A. Yes, sir.

Q. Where do you live?

A. 1801 Fiftieth Lane, North.

Q. How old are you?

A. Fifteen.

Q. Do they call you Dayton, Thomas, or Tommy, or what?

A. Tommy.

Q. Tommy?

A. Yes, sir.

Q. And you are fourteen now?

A. No, sir, I am fifteen now.

Q. What is your birth date?

A. May 3, '56 (Tr. p.18).

Since the evidence is further uncontroverted that the incident occurred in March of 1970, White would have been only thirteen years of age at the time that the molestation took place, some two months short of his 14th birthday.

Witness White could then, not be an accomplice because, as correctly stated by petitioner, for purposes of responsibility in criminal law a person fourteen years of age or older is recognized in Alabama as having reached the age of discretion, *LaBryer v. State*, 46 Ala. App. 33, 222 So.2d 361; *Darden v. State*, 12 Ala. App. 165, 68 So. 550. Accordingly, it has been held in a case involving a prosecution under Title 14, Section 326(2) that no requirement of corroboration is presented when the prosecuting witness was, at the time of the molestation, thirteen years of age, *Miller v. State*, 45 Ala. App. 169, 227 So.2d 801. Therefore, Judge Cates of the Alabama Court of Criminal Appeals was entirely correct in his holding in quoting from *Alldredge v. State*, 45 Ala. App. 171, 227 So.2d 803 that "no requirement of corroboration is presented in this record."

III

THE FACT THAT PETITIONER FAILED TO EXCEPT TO THE ORAL CHARGE OF THE TRIAL COURT PRECLUDES HIM FROM RAISING ANY QUESTION OF ERROR PREDICATED ON SUCH CHARGE NOW.

At the conclusion of the oral charge of the Court to the jury, the following colloquy transpired upon which petitioner seeks to predicate reversal of this case:

"THE COURT: Ladies and gentlemen, the defendant has submitted written charges which accurately depict the law in this case and the Court at this time will read them to you.

(Thereupon, charges requested by the defendant were read to the jury, following which the following proceedings were had and done:)

THE COURT: Ladies and gentlemen, I would like to say one thing further to this particular statute. Consent has nothing to do with it. A child under the age of sixteen is incapable under the law of giving his or her consent.

Gentlemen, are there any exceptions to the Court's oral charge?

(Thereupon, there ensued an off-the-record discussion, inaudible to the Court Reporter, at the bench, following which the following proceedings were had and done:)

THE COURT: Ladies and gentlemen, these written charges submitted by the defendant, as I stated, accurately depict the law but they are not in conflict with the law as explained by the Court in its oral charge.

Are there any exceptions of the Court's oral charge, gentlemen?

MR. BATCHELER: The State's satisfied.

MR. McCOLLOUGH: *The defendant is satisfied.*

THE COURT: Ladies and gentlemen, you may now retire for your verdict. The Court will send back the indictment and the written charges that has been submitted to you. Ladies and gentlemen you may retire." (Tr. p. 146), (emphasis supplied).

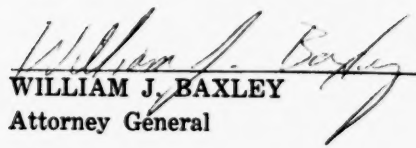
The law is well settled in Alabama that any error that may be present in any oral charges of the court cannot be made cause for reversal where no exception to the oral charges were reserved at trial, see e.g., *Hubbard v. State*, 283 Ala. 183, 215 So.2d 261; *Fendley v. State*, ____ Ala. App. ____, 272 So.2d 600; *Davis v. State*, 48 Ala. App. 629, 266 So.2d 839. The same rule is recognized by this Court, *Stein v. New York*, 346 U. S. 156, 73 S. Ct. 1077, 97 L.Ed. 1522, at note 17. See also *Singer vs. United States*, 380 U.S. 24, 85 S. Ct. 783, 12 L.Ed. 2d 630 and *Boyd v. United States*, 271 U.S. 104, 46 S. Ct. 442, 70 L.Ed. 857 for analogous holdings under Rule 30 of the Federal Rules of Criminal Procedure which sets forth a rule for Federal courts identical to that as set out above in *Hubbard*, *Fendley* and *Davis*, *supra*.

Furthermore, as set out in Section II, above, the fact that witness White was only thirteen years of age at the time of the molestation and thereby could not be an accomplice under Alabama law renders moot in this case any question concerning accomplices and the effect of their testimony. Accordingly, no error can be present in the refusal of petitioner's requested charge #38.

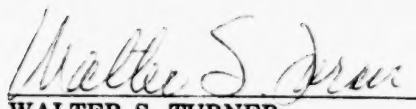
CONCLUSION

For the foregoing reasons it is respectfully submitted that the instant Petition For Writ of Certiorari is due to be denied.

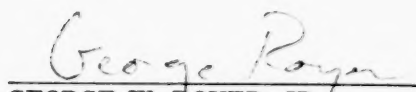
Respectfully submitted,



WILLIAM J. BAXLEY
Attorney General



WALTER S. TURNER
Chief Assistant Attorney General



GEORGE W. ROYER, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

ADDRESS OF COUNSEL:
250 Administrative Bldg.
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I, Walter S. Turner, one of the Attorneys For Respondent, and a member of the Bar of the Supreme Court of the United State, hereby certify that on the 24 day of JULY, 1973, I served copies of the foregoing Brief In Opposition of Respondent on Honorable William B. McCollough, Jr., by placing said copies in the mail, postage prepaid, and properly addressed to said attorney of record, as follows:

William B. McCollough, Jr.
Attorney at Law
910 Frank Nelson Building
Birmingham, AL 35203

Walter S. Turner

WALTER S. TURNER
Chief Assistant Attorney General

OF COUNSEL

APPENDIX

EXHIBIT "A"

6TH DIV. NO. 300

IN THE ALABAMA COURT OF CRIMINAL APPEALS

RALPH OLIVER DENNY,

Appellant

Vs.

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

BRIEF AND ARGUMENT OF APPELLANT

McCOLLOUGH, McCOLLOUGH AND CALLAHAN
ATTORNEYS FOR APPELLANT
910 FRANK NELSON BUILDING
BIRMINGHAM, ALABAMA

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STATEMENT OF THE CASE

This is an appeal from a verdict and judgment of guilty of indecent molestation of a male child under sixteen years of age, Title 14, Sec. 326 (2), Code of Alabama, 1940 (Recomp. 1958), and a sentence of five years imprisonment in the penitentiary and a fine of $5,000.00. (T. 4)

The indictment (T. 1) contained two counts, each charging a criminal sexual act by the defendant with one Dayton Thomas White, a male child under the age of sixteen years. The defendant entered a plea of not guilty to the indictment. (T. 4) The case was tried to a jury which returned a verdict of guilty under Count 2 and asssessed a fine in the amount of $5,000.00. The Court imposed additional punishment of five years imprisonment in the penitentiary. (T. 6)

On June 18, 1971, the defendant gave notice of appeal. (T. 150) Thereafter, within the time provided by law, the defendant filed his motion for a new trial (T. 153-157), which said motion was denied on September 24, 1971. (T. 158)

On June 22, 1971, the defendant filed a petition for a free transcript pursuant to the provisions of Title 15, Sections 380 (14) - 380 (25). Code of Alabama, 1940 (Recomp. 1958) (T. 159), and an affidavit in support thereof. (T. 161) This petition was denied by the Court on September 24, 1971. (T. 163)

The transcript of the record in this cause was filed in the office of the clerk of this Court on January 11, 1972.

On February 4, 1972, Appellant was granted an additional fifteen days for the filing of Appellant's brief.

STATEMENT OF THE FACTS

The State's first witness was Dayton Thomas White, a fourteen year old male who was the victim of the offense charged in the indictment. (T. 18) The witness testified that he first met the defendant through a friend of his named Robert Beasley, who had taken him to the defendant's house. (T. 19-20) White testified that sometime during March of 1970 he and Robert Beasley had visited the defendant's house in Birmingham and that at that time the had inserted his penis into the boy's "rump". (T. 22-23) The witness testified that this would occur in the presence of Curly Beasley and that at the conclusion thereof the defendant would give the witness $5.00. (T. 24) The witness was unable to identify with any particularity either the date or the place of the occurrence. (T. 25)

In response to a question by the District Attorney asking the witness to describe what happened on the occassion of the offense, the witness stated, "A. Just go up there and sometimes he would buy us beer and we would pull off our clothes and he would pull off his and then he would — get his private part and stick it up in our rump or whatever—" (T. 23)

On cross-examination the witness admitted that he had never made any complaint regarding this or any similar incident to anyone. (T. 28) He also testified that a friend of his, Carroll Henderson, was living with the defendant at the times of these occurrences. (T. 28-29)

The witness stated that he was a willing participant in the acts described in his testimony. (T. 35)

The State's next witness was Robert "Curly" Beasley, who testified that during the week of A. E. A., 1970, (Which he recalled as falling in January.) (T. 47) he had observed the defendant placing his penis into Dayton White's rectum. (T. 48) The witness testified that he sat on the bed and observed this activity and then voluntarily engaged in the same activity with the defendant. (T. 56-57)

The witness stated that prior to the defendant's trial he had been living with the White boy and his mother. (T. 49-50) The witness then testified that after engaging in the described conduct with Tommy White, the defendant would then place his "subpoena" in the witness's "directum". (T. 56) The witness testified that one Carroll Henderson, was present in the next room as this was occurring. (T. 57)

The witness also testified that Tommy White's mother had offered the witness a quarter to come and testify at the defendant's trial. (T. 60)

Mrs. Mihoko White was the State's next witness. (T. 64-65) The Court permitted this witness to testify, over objection, concerning a conversation which she had with the defendant. (T. 70-72) The substance of her testimony was to the effect that she had begged the defendant not to bother her son. (T. 72)

Officer Ann Sanders, a police officer with the City of Birmingham, was the State's next witness. (T. 75-76) An objection to the question as to whether or not the witness had had an occasion to investigate a complaint regarding the defendant was sustained. (T. 76) A question as to whether the witness had had an occasion to investigate a case involving Dayton White was answered in the affirma-

tive. (T. 76) An objection to a question regarding a conversation in connection with that investigation was sustained by the Court (T. 76-77) The witness was then asked whether she had talked to the defendant, Mihoko White, Dayton Thomas White, and Robert Beasley. The defendant objected to each such question. The Court overruled each objection. (T. 77) and the witness answered each in the affirmative.

The State illicited no further testimony from this witness.

The State rested and the defendant moved to exclude the State's evidence on the grounds that there had not been sufficient corroboration of the testimony of an accomplice to permit the case to go to the jury. (T. 79-84) The Court overruled the defendant's motion (T. 84) on the grounds that Beasley's testimony constituted corroboration.

The defendant called as his first witness Mr. Carroll Henderson. This witness testified that he had been living with the defendant at the time that the conduct complained of occurred. (T. 85) He stated that he knew both Thomas Dayton White and Curly Beasley. (T. 85) The witness stated that he had been present at the defendant's apartment on those occasions when White and Beasley would visit there and that there was never any impropriety of the sort charged in the indictment while he was there. (T. 84-89)

Ralph Oliver Denny, the defendant, took the stand and testified in his own behalf. (T. 100) The defendant denied the conduct charged in the indictment. (T. 107)

The defendant rested (T. 127) and the State recalled Thomas Dayton White and Mrs. Mihoko S. White in rebuttal. (T. 127-135) After the defendant renewed his motion for a

direct verdict the State and the defendant argued their case to the jury.

The Court's oral charge to the jury is not remarkable except that it did not touch upon that aspect of the law prohibiting a conviction on the uncorroborated testimony of an accomplice. The Court did however give the following charge at the request of the defendant:

> "39. I charge you, ladies and gentlemen of the jury, that if you believe from the evidence in this case that Thomas White was an accomplice because he willing submitted to the acts as shown by the testimony, then in order for you to convict the defendant in this case, you must believe beyond a reasonable doubt and to a moral certainty the testimony of Robert Beasley. Given, **J. J. J." (T. 7)**

Immediately thereafter the Court had the following comment:

> "THE COURT: Ladies and gentlemen, I would like to say one thing further to this particular statute. Consent has nothing to do with it. A child under the age of sixteen is incapable under the law of giving his or her consent." **(T. 146)**

The Court refused to give the affirmative charge at the request of the defendant. **(T. 8)**

The Court refused to give the following requested charge of the defendant:

"38. The Court charges you, ladies and gentlemen, that if you believe from the evidence that Thomas White, the alleged victim in this case, was a willing accomplice to the alleged criminal act, then it is your duty to find the defendant not guilty. Refused, J. J. J." (T.11)

PROPOSITIONS OF LAW

I

IT IS ERROR TO PERMIT THE STATE, BY DIRECT TESTIMONY OR INNUENDO AND INSINUATION, TO BOLSTER ITS WITNESSES WITH EVIDENCE, DIRECT OR INDIRECT, OF PRIOR EXTRAJUDICIAL STATEMENTS CONSISTENT WITH THEIR TESTIMONY AT TRIAL.

DREDD v. STATE, 26 Ala. App. 594, 164 So. 309
JAMES v. STATE, 115 Ala. 83, 22 So. 565
JONES v. STATE, 107 Ala. 93, 18 So. 237
POPE v. STATE, 251 Ala. 286, 36 So. 2d 899
MOORE v. STATE, 30 Ala. App. 552, 9 So. 2d 146
GREEN v. STATE, 96 Ala. 29, 11 So. 478
CHILDS v. STATE, 55 Ala. 25

II

IT IS ERROR FOR THE TRIAL COURT, IN EXPLAINING OR COMMENTING UPON WRITTEN CHARGES GIVEN AT THE REQUEST OF DEFENDANT, TO THEREBY QUALIFY, LIMIT OR MODIFY SUCH CHARGE, OR TO INCORRECTLY STATE THE LAW WITH RESPECT THERETO.

DICKEY v. STATE, 21 Ala. App. 644, 111 So. 426
HARRIS v. STATE, 24 Ala. App. 59, 129 So. 795
BAILUM v. STATE, 17 Ala. App. 679, 88 So. 200

III

"YEARS OF DISCRETION" FOR THE PURPOSES OF RESPONSIBILITY IN CRIMINAL LAW RANGES FROM FOURTEEN YEARS AND UPWARD.

LeBRYER v. STATE, 45 Ala. App. 33, 222 So. 2d 361
KEY v. STATE, 4 Ala. App. 76, 58 So. 946

PROPOSITION OF LAW IV

IN A PROSECUTION FOR INDECENT MOLESTATION OF A MALE UNDER SIXTEEN, A CONVICTION MAY NOT BE HAD UPON THE TESTIMONY OF A FOURTEEN YEAR OLD PATHIC WHO WILLINGLY PARTICIPATED IN THE ACT, WHERE SUCH TESTIMONY IS CORROBORATED ONLY BY THE TESTIMONY OF ANOTHER FOURTEEN YEAR OLD BOY WHO TOOK THE PATHIC TO THE DEFENDANT'S APARTMENT, INTRODUCED THE PATHIC TO THE DEFENDANT, SAT ON THE BED WITH THE PATHIC AND THE DEFENDANT AS THE ACT WAS COMMITTED, AND THEN HIMSELF ENGAGED IN A SIMILAR ACT WITH THE DEFENDANT.

LaBRYER v. STATE, 45 Ala. App. 33, 222 So 2d 361
LEONARD v. STATE, 43 Ala. App. 454, 192 So 2d 461
STOKELY v. STATE, 254 Ala. 534, 49 So. 2d 284
STRANGE v. STATE, 43 Ala. App. 599, 197 So. 2d 437

ARGUMENT OF PROPOSITIONS

I

(PROPOSITION OF LAW I)

Appellant's first contention is that reversible error occurred in the examination by the State of Mrs. Ann Sanders, a police officer for the City of Birmingham. (T. 75-79)

After the witness was identified, the District Attorney asked if she had had an occasion to investigate a complaint on the defendant. An objection to this question was sustained by the Court. (T. 76) The District Attorney then asked the witness if in her capacity as a police officer, she had had an occasion to investigate a case involvng Dayton Thomas White. The record indicates that the witness gave an affirmative answer to this question and that immediately thereafter the defendant made an objection on the same grounds as assigned to the previous question. The Court properly pointed out that the question had been answered. (T. 76)

The District Attorney then posed a question concerning a conversation and then changed the question to inquire as to what the witness had done in connection with the investigation of the case (involving Dayton Thomas White). The defendant's objection to this question was sustained. (T. 76-77)

The District Attorney next asked the witness whether she had ever talked to Mr. Ralph Oliver Denny, the defendant. The defendant's objection to that question was overruled. The witness answered in the affirmative. (T. 77)

The District Attorney asked the witness if she had talked to Mihoko White. The defendant's objection to this question was overruled. The witness answered in the affirmative. (T. 77)

The District Attorney asked if the witness had talked to Dayton Thomas White. The Court overruled the defendant's objection to this question. The witness answered in the affirmative. (T. 77)

The witness was then asked by the District Attorney if she had talked to Robert Beasley. The defendant's objection to this question was overruled. The record does not reflect that this question was answered. (T. 77)

The District Attorney asked the witness if she had been assigned to the investigation of the case involving Dayton Thomas White. The defendant's objection to this question was overruled. The witness answered in the affirmative. (T. 78) The District Attorney asked the witness when she had been assigned to the case. The defendant's objection was overruled and the question was answered by the witness. (T. 78)

The District Attorney then asked the witness to identify the first person she had talked to about that investigation. The defendant's objection to this question was sustained by the Court. (T. 78)

The District Attorney then asked the witness if she was present at the time that the defendant was arrested. The defendant's objection to this question was overruled. The witness answered in the affirmative. (T. 79)

There were no further questions put to this witness by the State.

There was no cross-examination of this witness by the defense. (T. 79)

The witness was excused and the State rested its case.

The matters brought out by the state on the examination of this witness were not legal for any purpose. *Pope v. State*, 251 Ala. 286, 36 So. 2d 899. Not only did the Court err in overruling the defendant's objection to these questions but it is further submitted that the conduct of the District Attorney in calling this witness to the stand and asking the questions put to the witness would constitute reversible error had the Court sustained the defendant's objections thereto. See *Dredd v. State*, 26 Ala. App. 594, 164 So. 309.

This witness was placed on the stand for the sole purpose of bolstering the testimony of the State's witnesses by presenting to the jury a police officer who had interviewed each witness and the defendant and who, by inference, had thereafter caused the defendant's arrest. The use of this tactic by the State to bolster, by innuendo and insinuation, the testimony of its witnesses is prejudicial to the substantial rights of the defendant and calls for a reversal of this conviction.

Appellant further suggests that the conduct of the District Attorney in this regard is so highly prejudicial that a reversal would be required even in the absence of a motion for a mistrial below.

The Court ought not and will not countenance the asking by the District Attorney of illegal and improper questions

which interject into the proceedings insinuations prejudicial to defendant. *Dredd v. State,* supra. In the Dredd case it was held that the test to be applied in determining misconduct vel non by the District Attorney in asking improper questions of a witness is to be found in the answer to the question: "What was the purpose of counsel in asking the question?" The Court then went on to say "If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proved in the manner attempted then it was error." *Dredd v. State,* supra.

The prejudice to the Appellant, however, was compounded by the error of the trial Court in overruling the defendant's objections to these questions and permitting the witness to answer the questions put to her. The substance of the evidence elicited was that this witness, a police officer for the City of Birmingham for some twelve and a half years, had been assigned to investigate a case involving Dayton Thomas White; That in connection therewith she talked to the defendant, Mihoko White, Dayton Thomas White and Robert Beasley; and that thereafter she was present when the defendant was arrested. It is apparent from the record in this case that the State was thereby attempting to bolster its witnesses, specifically White and Beasley. Such evidence is illegal. A witness may not be fortified or corroborated by evidence concerning extrajudicial statements consistent with his testimony in Court. *Pope v. State,* supra; *James v. State,* 115 Ala. 83, 22 So. 565; *Jones v. State,* 107 Ala. 93, 18 So. 237; *Moore v. State,* 30 Ala. App. 552, 9 So. 2d 146; *Green v. State,* 96 Ala. 29, 11 So. 478; *Childs v. State,* 55 Ala. 25.

While the District Attorney did not pursue the inquiry into the substance of the conversations as to which the wit-

ness testified, he did elicit testimony that the defendant was arrested in the presence of the witness at the conclusion of the witness's investigation, thereby, through innuendo, placing evidence of prior extrajudicial statements consistent with their testimony in Court before the jury.

Appellant submits that the matters here brought out by the State in the testimony of Mrs. Ann Sanders were not legal for any purpose and could not be made legal so far as is shown by the record. It was therefore reversible error to overrule the defendant's objections to these questions.

II

(PROPOSITIONS OF LAW II AND III)

The record in this case shows that at the conclusion of the Court's oral charge the Court stated that it was reading to the jury written charges requested by the defendant which accurately depicted the law of the case. (T. 145-146) The Trial Court then gave several written charges requested by the defendant the last of which was the following:

> "39. I charge you, ladies and gentlemen of the jury, that if you believe from the evidence in this case that Thomas White was an accomplice because he willing (sic) submitted to the acts as shown by the testimony, and in order for you to convict the defendant in this case, you must believe beyond a reasonable doubt and to a moral certainty the testimony of Robert Beasley."

The record then indicated that the Court, at the time of giving the above charge and in connection therewith, stated to the jury:

"THE COURT: Ladies and gentlemen, I would like to say one thing further to this particular statute. Consent has nothing to do with it. A child under the age of sixteen is incapable under the law of giving his or her consent."

The rule is that it is proper for the Court to explain to the jury the meaning of written charges given at the request of a party, but not to qualify, limit, or modify such charges. *Bailum v. State*, 17 Ala. App. 679, 88 So. 200; *Harris v. State*, 24 Ala. App. 59, 129 So. 795; *Dickey v. State*, 21 Ala. App. 644, 111 So. 426.

The Court's statement regarding the above written charge rendered the giving of that charge valueless. Such error has been held to be prejudicial error. *Dickey v. State*, supra.

Furthermore, the statement was incorrect insofar as it dealt with the question of consent. In this regard, the effect of this statement was to remove the consideration of a material fact from the jury.

A child fourteen years of age or older is recognized as having reached the age of discretion for the purposes of responsibility in criminal law. See *LaBryer v. State*, 45 Ala. App. 33, 222 So. 2d. 361; *Key v. State*, 4 Ala. App. 76, 58 So. 946.

The Court, by this comment, not only removed from the consideration of the jury the question of whether or not Thomas White was an accomplice but also effectively repudiated the charge given by the Court at the request of the defendant.

Appellant contends that such error compels a reversal of the conviction in this case.

III

(PROPOSITION OF LAW IV)

If the participants in conduct constituting a felony under the statute in this case have reached the age of discretion and are willing participants in such conduct, each, as a matter of law, is an accomplice and a conviction of one may not be had upon the uncorroborated testimony of the other. *LeBryer v. State*, 45 Ala. App. 33, 222 So. 2d 361. In order to sustain this conviction, therefore, the State must corroborate the testimony of Dayton Thomas White.

In ruling on the defendant's motion to exclude the State's evidence, the Court held that the testimony of Thomas White had been corroborated by the testimony of Robert Beasley. (T. 84)

It is Appellant's contention that in this regard, the Court permitted reversible error.

This contention is premised upon the theory that Beasley was an accomplice to the commission of the offense charged and that therefore his testimony could not be used to corroborate the testimony of White, who was likewise an accomplice. *Leonard v. State*, 43 Ala. App. 454, 192 So. 2d 461.

The question as to whether or not Beasley was an accomplice to the offense charged in this case is a question of law directed to the Court. *Strange v. State*, 43 Ala. App. 599, 197 So. 2d 437.

Among the facts relevant to this determination are the following: Both White and Beasley testified that Beasley had shown White where the defendant lived and had initially taken White to the defendant's apartment. (T. 19, 20, 45) White described the activity upon which the prosecution was based as a joint affair involving Beasley as well as the defendant and himself. (T. 28) Each admitted that their participation in this activity was willing and voluntary. (T. 57, 58) Each of the boys were given $5.00 by the defendant. (T. 59) Both testified that immediately after the act complained of in the indictment, Beasley and the defendant participated in a similar act.

Under these facts it was for the Court to determine whether or not Beasley was an accomplice.

A very thorough discussion regarding this issue may be found in *Leonard v. State*, supra. It is therein held that the classic test of making the determination of whether or not a witness is an accomplice is to determine whether or not he could have been indicted and convicted of the offense charged either as principal or accessory.

Both Beasley and White had reached the age of discretion. *LaBryer v. State*, supra. Each was a willing participant on the occasion of the conduct charged in the indictment. Beasley was solely responsible for White's presence at the defendant's apartment on the occasion of the offense charged. White testified that he and Beasley disrobed at the same time. (T. 23) There can be no question but that the role played by Beasley on the occasion of the offense charged went far beyond one of mere presence. Beasley committed, in concert with White and the defendant, acts which admit of no other

reasonable inference than that he was an active freewilled participant in the crime charged.

It is well established that when, by prearrangement or on the spur of the moment, two or more persons enter upon a common enterprise or adventure, and a criminal offense is contemplated then each is a conspirator, and if the purpose is carried out, each is guilty of the offense committed, whether he did any overt act or not. *Stokely v. State*, 254 Ala. 543, 49 So. 2d 284.

It is Appellant's contention that Beasley could have been indicted for the offense of which defendant stands convicted. He procured the presence of White on the occasion of the offense charged; he actively participated in the crime by disrobing; he sat in close physical proximity and observed as the offense charged was committed; he engaged in a similar act himself; he, as did White, received $5.00 from the defendant on this occasion.

Furthermore, Appellant contends that this evidence is sufficient to sustain a conviction of Beasley for the offense charged in the indictment in this case.

Construing the undisputed evidence most favorably toward the noncomplicity of Beasley as an accomplice there still remains these unchallenged acts by Beasley which would support a verdict of guilt of the offense charged. *Leonard v. State*, supra.

The question of law presented to the Court thus turning on undisputed evidence, it was error for the Court to hold that Beasley's testimony corroborated the testimony of White. The Court erred in refusing the defendant's motion to ex-

clude the State's evidence in the absence of any legal evidence to corroborate the testimony of the two accomplices to the crime, White and Beasley. *Leonard v. State, supra.* Beasley's conduct admits of no other reasonable inference than that he was an active freewilled participant in the crime charged, and subject to indictment as having aided and abetted therein.

Appellant also contends that, on the same grounds as are hereinabove set forth, the Court erred in refusing to give the affirmative charge at the request of the defendant. (T. 8)

CONCLUSION

Each of the errors relied on by Appellant in seeking to overturn his conviction below are, each independently of the other, of sufficient magnitude to call for a reversal of the judgment below. Taken together such errors have deprived Appellant of the fair trial to which he is entitled.

A reading of the record in this case, particular attention being paid to the enumerable inconsistencies between the testimony of Dayton Thomas White and Robert Beasley, should dispel any reluctance this Court might have to reverse Appellant's conviction and send this case back to Jefferson County for a new trial free of error affecting his substantial rights.

McCollough, McCollough

& Callahan

By N. P. CALLAHAN, JR.

Attorneys for Appelant

Appellant desires to argue this matter orally before the Court.

N. P. CALLAHAN, JR.

Of Counsel

CERTIFICATE OF SERVICE

I, N. P. Callahan, Jr., of counsel for appellant, hereby certify that I have this the 24th day of February, 1972 served a copy of the foregoing brief and argument on the Honorable William Baxley, Attorney General of the State of Alabama, by mailing a copy of same to him, postage prepaid.

N. P. CALLAHAN, JR.

Of Counsel for Appellant

EXHIBIT "B"

6TH DIV. NO. 300

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

RALPH OLIVER DENNY
APPELLANT

VS.

THE STATE OF ALABAMA
APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

BREIF AND ARGUMENT IN SUPPORT OF
APPLICATION FOR REHEARING

BILL McCOLLOUGH, JR.
McCOLLOUGH & McCOLLOUGH
ATTORNEYS FOR APPELLANT
910 FRANK NELSON BUILDING
BIRMINGHAM, ALABAMA 35203

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The Appellant files this Brief in Support of the Application for Rehearing because of the misconstruction of the law by the trial judge and the Court of Criminal Appeals of Alabama.

PROPOSITION OF LAW I

THE TRIAL JUDGE BY STATING "CONSENT HAS NOTHING TO DO WITH IT. A CHILD UNDER THE AGE OF 16 IS INCAPABLE OF GIVING HIS OR HER CONSENT," CREATES REVERSIBLE ERROR.

PROPOSITION OF LAW II

TESTIMONY OF THE VICTIM OF THIS ALLEGED CRIME IS REQUIRED TO BE CORROBORATED AND THAT THE TESTIMONY OF ROBERT BEASLEY, WHO WAS PRESENT ON TWO OCCASIONS, WAS IN EFFECT AN ACCOMPLICE OF THE DEFENDANT AND REQUIRED CORROBORATION.

ARGUMENT OF PROPOSITIONS

I

Despite the fact of the record not showing an exception taken on behalf of the Defendant when the statement, "Consent has nothing to do with it. A child under the age of 16 is incapable of giving his or her consent," was made by the Honorable Joseph Jasper, the record amply reflects that the Motion for New Trial pointed out to the Court the error complained of and is sufficient and can be raised for the first time on appeal in denying the Motion for New Trial. (TR Pages 153 through 157) Specifically these are called

to the Court's attention and to the appeal court in motion for new trial Numbers 39 and 41. The Judge made an incorrect statement of law and the jury, it might be rightfully presumed, decided that regardless of the Judge's charges, the matters and things that the Appellant complained of, both in charges and in argument, were not of importance since it made no difference if what the Judge says is true concerning consent.

II

Appellant insists that the Court of Criminal Appeals has misconstrued the law to the facts in this case. The transcript reveals that the victim, Dayton Thomas White, was *fifteen years of age* (TR Page 18). The record further reflects that the other accomplice, Robert Beasley, is *fifteen years of age* also, and an accomplice cannot corroborate another accomplice's act. Due to the age of these individuals, the Court's statement "No requirement of corroboration is presented in this record. Blocker v. State, 40 Ala. App. 658, 120 So. 2d 924," has no bearing because that case holds "It is presumed that infant between ages of seven and fourteen is incapable of committing a felony."

The Appellant would further show that the requirements of *Fuller v. The State*, 39 Ala. App. 90, 94 S. 2d 788, have not been met in this case simply because the testimony of the willing pathic has not been corroborated and cannot be corroborated through another accomplice.

The Court's reference to *LaBryer*, 45 Ala. App. 33, 222 So. 2d 361, states the correct law that if pathic is an alleged sodomy victim acting under duress, he would not be an accomplice.

A reading of this entire record shows that both boys were in fact accomplices and were in fact willing. There is no evidence whatsoever of force or duress, otherwise, he is an accomplice, and even under the *LaBryer* case must be corroborated. In the *Alldredge*, 45 Ala. App. 171, 227 So. 2d 803, case the Court of Criminal Appeals held that a thirteen year old boy whose testimony, if believed to the required degree, was sufficient to support a jury's verdict. There is no case showing that a person fourteen and older be it a child, an adult or what, can be an accomplice without corroboration in order to sustain a conviction. Therefore, there is no need for the Appellant in this case to present evidence displacing the presumption that an infant between the ages of seven and fourteen is incapable of committing a felony.

CONCLUSION

For the above reasons, particularly Proposition of Law II, concerning the accomplice and the testimony thereof, the Appellant once again *insists* that the Court of Criminal Appeals erred in misconstruing the law applicable to corroboration to the facts of the instant case. The Court must not be misled by brief of the Appellee as he cites *"Osborn v. State*, 36 Ala. App. 403, 56 So. 2d 786," concerning consent, and using an illustration of statutory rape, which is not applicable here, for here is only two willing victims that needed to be corroborated and are not within the required age which seeks to protect the children as erroneously applied by this Court. Therefore, we earnestly solicit an understanding that consent is not an ingredient or participant in the ajudication of this cause, and the Appellant respectfully requests a reversal.

Respectfully submitted,

McCOLLOUGH & McCOLLOUGH

By BILL McCOLLOUGH, JR.

Bill McCollough, Jr.

Attorneys for Appellant

Appellant desires to argue this case orally before the Court.

BILL McCOLLOUGH, JR.

Of counsel

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief and Argument in Support of Application for Rehearing upon the Honorable William Baxley, Attorney General of the State of Alabama, and attorney of record for such State, by placing a copy of same in the United States mail, postage prepaid, and properly addressed to him.

This the 26th day of December, 1972.

BILL McCOLLOUGH, JR.

Of Counsel

EXHIBIT "C"

6TH DIV. NO. 300

IN THE SUPREME COURT OF ALABAMA
EX PARTE: RALPH OLIVER DENNY
IN RE: RALPH OLIVER DENNY,
APPELLANT

VS.

STATE OF ALABAMA,
APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

PETITION FOR CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF ALABAMA:

Comes now the Petitioner, Ralph Oliver Denny, by and through his attorney of record, and respectfully petitions this Honorable Court to review and to reverse the decision and judgment of the Court of Criminal Appeals of Alabama rendered in the above styled cause on December 12, 1972, affirming the judgment of conviction had in the Circuit Court of Jefferson County, Alabama.

Petitioner avers that he has duly filed an Application for Rehearing in the Court of Criminal Appeals of Alabama in this cause within the time required by law, raising the

points hereinafter set forth and that said Application for Rehearing was denied.

As grounds for this Petition for Writ of Certiorari, the Petitioner sets down and assigns the following, separately and severally:

For that the decision of the Court of Criminal Appeals is in conflict with a prior decision of this Honorable Court in that its application of a point of law to the facts conflicts with a prior decision of this Honorable Court. In its opinion the Court of Criminal Appeals stated:

> "Appellant's first claim of error is that the trial court erred in allowing (over objection) a police woman to testify that she went to see the Defendant and other persons. The State in effect, Appellant argues, was trying to bolster the testimony of its other witnesses. The State contends, however, that this is not so; that the purpose of the testimony was to show an early complaint by the child and the ensuing investigation. Since nothing in the nature of an inculpatory admission or prejudicial conduct came out in this testimony, we consider this evidence altogether harmless. Supreme Court Rule 45."

In the case of *Dredd v. The State*, 26 Ala. App. 594, 164 So. 309, this Honorable Court stated in part as follows:

> "There were many questions asked to which there were timely objections and exceptions of Defendant as to what was done by other parties . . . and with which this Defendant was in no way connected. This was no part of the res gestae and the Defendant's case should not have been burdened with questions . . . clearly illegal and

tending to prejudice the jury as to the testimony being given . . . The persistent asking of such illegal questions constitutes insinuations prejudicial to Defendant, which the Court ought not and will not countenance. In this connection we adopt as our own the following from People v. Grider, 13 Cal. App. 703, 110 p. 586, 590: 'Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in answer to the question: "What was the purpose of counsel in asking the question?" If it was to take an unfair advantage of the Defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted, then it is error. And, if the district attorney knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained."

In its opinion, the Court of Criminal Appeals stated: "The trial judge gave one of the Defendant's written requested charges and thereafter added, on his own, 'Consent has nothing to do with it. A child under the age of 16 is incapable of giving his or her consent.' To this remark no exception was taken. Hence, there is no matter reserved for our consideration."

In the case of *Bailum v. State*, 17 Ala. App. 679, 88 So. 200, this Honorable Court stated in part as follows:

"There was a non-compliance by the Court of . . . statutory requirement, and it appears from the record that the court read several written charges to the jury, given at the instance of the Defendant, and after each charge

was read, and before reading another charge, the court proceeded to qualify, limit, or modify the charge just read. The effect in practically such (sic) instance was to destroy or emasculate the written charges just read . . . The rule is that it is proper for the court to explain to the jury the meaning of written charges given at the request of a party, but not to qualify, limit, or modify such charges."

In addition, in the case of *Labryer v. State*, 45 Ala. App. 33, 222 So. 2d 361, this Honorable Court stated in part as follows:

" 'Years of discretion' for the purposes of the responsibility in criminal law . . . is usually said to range from fourteen years and upward."

In its opinion, the Court of Appeals further stated:
"The third part raised by Appellant is a claim that the testimony of the victim of this crime is required to be corroborated and that another boy who was present on two occasions was, in effect, another accomplice of the Defendant. The construction of Section 307, T. 15, 1940 Code, is impermissible. The statute about child molestation, very much like the statutes against carnal knowledge of girls under the age of consent, is directed at acts toward children and not at acts participated in by two persons, as in the case of say, sodomy . . ."

In the case of *Labryer v. State*, supra, this Honorable Court stated in part as follows:

"Blackstone tells us that if both (participants) are arrived at years of discretion . . . (the perpetrator and

consenting party are both liable to the same punishment)."

"In felonies the testimony of an accomplice requires corroboration. Code 1940, T. 15, Sec. 307, reads: 'Sec. 307. A conviction of felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient."

These holdings are in conflict, and the Court of Criminal Appeals erred in failing to follow the decisions of this Honorable Court.

Wherefore, premises considered, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to the Court of Criminal Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of the record and all proceedings of said Court of Criminal Appeals of Alabama in the cause numbered and entitled as aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the judgment of the Court of Criminal Appeals or render such judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Criminal Appeals to stay or recall its Certificate of Judgment during the pendency of this petition.

And Petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate and to which it may be entitled.

Submitted herewith is Brief and Argument in support of this petition.

Respectfully submitted,

McCOLLOUGH & McCOLLOUGH

By BILL McCOLLOUGH, JR.

Bill McCollough, Jr.
Attorneys for Appellant
910 Frank Nelson Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Writ of Certiorari upon the Honorable William J. Baxley, Attorney General, by placing a copy of same in the United States Mail, postage prepaid, and properly addressed to him on this the 5th day of February, 1973.

BILL McCOLLOUGH, JR.

Bill McCollough, Jr.